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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 196

AMERICAN CHAIN COMPANY, INC., Petitioner,

vs.

ROBERT O. LOOK, Commissioner of Internal Revenue,
District of Connecticut, Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTARY STATEMENT OF MATTERS INVOLVED

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER,

vs.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT, RESPONDENT.

SUPPLEMENTARY BRIEF OF PETITIONER

Statement of Facts.

The three consolidated actions before this Court, which are identical except that they cover different taxable years, were brought by the petitioner to the United States District Court of Connecticut for the recovery of excise taxes alleged to have been illegally assessed and collected under Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924.

Section 900 of the Revenue Act of 1921, with which Section 600 of the Revenue Act of 1924 is substantially identical, reads as follows:

> "That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer,

or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;"

Prior to the bringing of these actions, by decisions of court and departmental rulings, the taxable types of automotive vehicles were limited to vehicles primarily designed for the transportation of passengers and property on highways, eliminating all automotive vehicles primarily designed for performing mechanical functions such as fire-fighting engines and apparatus, snow plows, road scrapers, road graders and street sprinklers. Tractors were specifically exempted by the Act. As a result, the only types of commercial vehicle subject to the tax were passenger automobiles and trucks.

Through administrative regulations as interpreted by this Court in *Universal Battery Company* v. *United States*, 281 U. S. 580, it was established that the basis of classification of manufactured articles as parts or accessories of automotive vehicles taxable under the above Revenue Acts was their relation to such vehicles, and that articles of manufacture primarily adapted for use on taxable motor vehicles must be classified as parts or accessories therefor, even though they had some other use for which they were not so well adapted, while articles of manufacture equally

adapted for a variety of uses and commonly put to such uses, one of which was with relation to taxable types of motor vehicles, are not subject to classification as parts or accessories.

It will be noted that the opinion in *Universal Battery Company* v. *United States* above cited, in discussing primary adaptation, equal adaptation and common use, employs the general term *motor vehicles.* In view of the prior specific statement by the court that the motor vehicles referred to in the Acts were those enumerated, it is evident that the term "motor vehicles" was used by the court as referring only to the types of motor vehicles enumerated in the Acts.

In the present actions the issues joined in the district court were as follows:

First, the petitioner alleged and the respondent denied that the tire chains on which the taxes had been assessed and paid were not primarily adapted for use on the taxable types of automotive vehicles enumerated in the Acts, but were equally adapted for use on various types of non-taxable automotive vehicles, namely, tractors, fire engines, snow plows, road scrapers, road graders and sprinklers.

Second, the respondent by motion to dismiss and motion for judgment raised the issue that Section 424 of the Revenue Act of 1928 precluded the court from taking jurisdiction of the actions, or of rendering judgment for the respondent. The petitioner alleged in the complaints that the taxes paid had been absorbed without increase of selling price and without passing it on to purchasers,—which allegation was denied by the respondent.

Upon this issue of law raised by the respondent, the petitioner claimed that the district court not only had jurisdiction of the actions, but the authority to determine as an issue of fact whether or not the taxes had been passed on.

Upon the trial in the district court the petitioner offered the evidence of forty-six witnesses, including its own executive officers and district managers, independent jobbers and dealers, manufacturers of fire equipment, of tractors and snow plows, and officials of municipal fire departments, —the field of observation of which witnesses covered the greater part of the country.

Through this evidence it was proved that the tire chains manufactured by the petitioner were designed and adapted generally for automobiles, trucks and the specific types of non-taxable vehicles specified above; that the chains were generally advertised for use on non-taxable as well as taxable types of vehicles; that with few exceptions the chains were sold to jobbers who in turn resold them to retailers, who in turn resold them to the trade; that the tire chains were bought by the trade by numbers and sizes without designation of intended use; that the same types of chains were used on taxable and non-taxable types of automotive vehicles without changes or adjustments; that the chains were inter-changeable between taxable and non-taxable vehicles using the same sizes of tires, and in actual practice were interchanged; and that the use of the chains on the non-taxable types of automotive vehicles was a common and substantial use. The evidence also established the fact that at the instant of sale, when the tax became effective, there was no means of determining the ultimate use of any particular set of chains.

The petitioner also offered evidence that it assumed the economic burden of the tax without imposing the same upon the purchasers of its chains.

Upon the trial, the District Court ruled that any recovery by the petitioner would be limited to specific sizes of chains with respect to which equality of adaptation for and common use on non-taxable vehicles was proved. Of the total number of sizes of chains manufactured by the peti-

tioner, there were a few not specifically covered by this proof, representing a comparatively small number of the chains sold and the taxes upon these sizes amounted to less than three per cent of the total taxes paid. Hereafter in this brief references to the petitioner's chains will include only the forty-nine sizes upon which recovery was allowed by the District Court.

The respondent offered no evidence which in any material respect controverted that offered by the petitioner.

In rendering judgment for the petitioner the District Court found the subordinate facts substantially in accord with the evidence offered by the petitioner, and from these subordinate facts drew the conclusions upon which its decision was predicated, namely, that the chains which had been subjected to the tax were not primarily adapted for use on the types of automotive vehicles enumerated in the Revenue Acts of 1921 and 1924, but were equally adapted for use on various types of vehicles not included in the Acts and were commonly so used. The District Court also found for the plaintiff upon the issue of fact raised under Section 424 of the Revenue Act of 1928.

The respondent in its appeal to the Circuit Court of Appeals, in its assignment of errors, did not question the correctness of this latter finding by the District Court.

Upon appeal by the respondent to the Circuit Court of Appeals for the Second Circuit, that Court in reversing the judgment of the District Court, found as a fact, without adequate support in the finding by the trial court, that the chief or principal use of petitioner's chains was for taxable types of automotive vehicles, and then held as a conclusion of law that chief use was determinative of primary adaptation.

The Circuit Court of Appeals also overruled certain essential findings of fact in the opinion of the District Court,

and substituted therefor conflicting findings of fact from which it drew supporting conclusions at variance with those of the District Court.

The issue under Section 424 of the Revenue Act of 1928 was not passed upon in the opinion of the Circuit Court of Appeals.

The questions which will be discussed in this brief are:

(1) The question of chief use;
(2) The issue raised under Section 424 of the Revenue Act of 1928;
(3) The findings of fact of the Circuit Court of Appeals claimed by petitioner to be erroneous and without authority.

ARGUMENT.

I.

Chief Use.

The Circuit Court of Appeals erred in applying the doctrine of chief use, first, because there is no adequate support in the Record for the finding of chief use as a fact, and, second, the doctrine of chief use is not applicable as a principle of law in the determination of primary adaptation.

The evidence offered in the District Court of the general custom of the purchase of chains by numbers and sizes, and not for specific purposes, demonstrated the impossibility of ascertaining the numbers of chains used by the different types of automotive vehicles. The only findings of the trial court on this question are as follows:

> "From the evidence I find that the chains in question were all sold by the plaintiff to jobbers and deal-

ers, so that even the plaintiff did not know, and could not know, how many of the chains thus sold were eventually used or purchased for use on non-taxable vehicles"; (R. 18.)

"It may also be noted that the number of taxable vehicles during the taxable periods exceeded the number of non-taxable motor vehicles. If that fact was not fully established by competent evidence, at least it was conceded by the plaintiff on brief." (R. 19.)

The District Court also refused to find in each of the three cases findings requested by the respondent that the chief or principal use of petitioner's tire chains was on the tires of automobiles, trucks, automobile wagons and other automobiles (R. 38).

Although there was no finding by the District Court on the question of comparative use as between taxable and non-taxable vehicles, the evidence indicated the fact that the use on tractors, fire equipment and snow plows was more continuous than on the taxable types of vehicles, such as trucks and automobiles (R. 90, 96, 98).

The Circuit Court of Appeals has predicated its finding of chief use upon an undefined preponderance in number of taxable vehicles over non-taxable vehicles with no finding of fact by either court as to comparative use of chains as between non-taxable and taxable vehicles, and the only available evidence indicating a more extensive use of chains on non-taxable than on taxable vehicles. Such a finding by the Circuit Court of Appeals is not justified.

The doctrine of chief use as a principle of legal application originated in the administration of the tariff laws which employ the terms "chief use," "chief value," "chief content" and other equivalents as methods of classification.

In *Magone* v. *Wiederer,* 159 U. S. 555, the term "chief use" was stated to be "a vague and uncertain term." In

that case and the earlier case of *Magone* v. *Heller*, 150 U. S. 70, where the factual conditions were sufficiently different from those before the court in this case as to prevent the conclusions of the court being an exact precedent, the underlying theory of the two opinions is that in the classification of a specific article, chief use for a particular purpose ceases to be controlling when the article has commercially a common or general use for another purpose. The logic of the proposition is simple. A tire chain equally adapted for use on an automobile and a tractor and commonly used for each purpose is no more an accessory for one than it is for the other,—otherwise the term "accessories or parts" would be given a broader interpretation than can be accorded to the specifically enumerated types of automotive vehicles which the term "parts or accessories" qualifies.

The present contention of the respondent would require the same interpretation of the Acts as would be accorded if the Acts expressly made subject to the tax accessories and parts of all motor vehicles instead of accessories and parts of the enumerated motor vehicles. That the initial understanding of the scope of the Acts by the Commissioner accorded with that advanced by the petitioner is indicated by the language used in Regulations 47 (Revised Dec., 1921), Article 15, in defining "parts":

> Art. 15. Definition of parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

The adoption of the interpretation now claimed by the respondent would constitute a denial of the established doctrine that tax laws must be construed strictly against the Government and in favor of the taxpayer and that the Courts are limited by the clear import of the literal words used. In 1926, Section 600 of the Revenue Act of 1924 was repealed and in the Revenue Act of 1932, Section 606, Congress, in imposing a new automobile excise tax, has in specific terms made tire chains, storage batteries, ignition coils and various other articles then held by Court decisions to be non-taxable under former Acts, subject to classification as parts or accessories "when suitable for use on or in connection with" the taxable types of motor vehicles which are subject to the tax "whether or not primarily adapted for such use."

This evidences a legislative recognition of the non-taxability of these articles under the former Acts.

In view of the interpretation of the provisions of the former Acts by Departmental Regulations, and the decision of this Court in the Universal Battery case, there was at the date of the adoption of the 1932 Act no ambiguity in the law which would permit the use of the 1932 Act in ascertaining the intention expressed in the 1921 and 1924 Acts. If there had been it is clear that under the established rules the action on the part of Congress in specifically enlarging the scope of the former Acts would be interpreted as an intent to change the original law.

United States v. *Woodruff*, 175 Fed. 776.
Brewster v. *Gage*, 280 U. S. 327.

Under the ordinary rules of terminology, chief use of a manufactured article for one purpose is in no way inconsistent with equal adaptation or common use for another purpose. The principal use of shot guns is in the pursuit of game, but shot guns are equally adapted for and com-

monly used in shooting clay pigeons and other moving targets.

Primary adaptation, equality of adaptation and common use are methods of classification which can be applied with reasonable certainty.

Chief use, unless given a more accurate definition than hitherto, would be an inaccurate method of classifying manufactured articles destined to pass through the hands of jobbers, wholesalers and retailers to the ultimate consumer who customarily purchases the article without designation of its intended use.

The present case differs from the cases of *Routzahn* v. *Willard Storage Battery Company,* No. 329, and *United States* v. *Jefferson Electric Manufacturing Company,* No. 171, only to the extent that the commercial use of tire chains is limited to motor vehicles, while in those cases uses for purposes other than motor vehicles were found. The petitioner's contention is that this is not a material distinction. Common use for non-taxable purposes is an issue of fact to be determined by a trial Court upon the evidence. The non-taxable uses of an article restricted to various types of automotive vehicles may well be more common and substantial uses than the non-taxable uses of a different article employed in other connections than for automotive vehicles.

The Circuit Court of Appeals for the Second Circuit is the only Circuit Court of Appeals which has applied the doctrine of chief use in this class of cases.

In the case of *McCaughn* v. *Electric Storage Battery Company,* 63 Fed. (2d) 715, the Circuit Court of Appeals for the Third Circuit in passing upon this issue said:

> "The fact that automobiles are the largest users of storage batteries, is not decisive of the case. That they are the largest users is a fact, but taxability of a battery under this statute depends, not upon the quan-

tity used, but upon whether or not it is primarily adapted for use in an automobile and not equally adapted to any other use requiring the same load. Unless it fulfills these two requirements, it is not a 'part or accessory' within the meaning of this statute. Judge Kirkpatrick, who saw the witnesses and heard all the testimony, has expressly found it is not and the testimony, fairly interpreted, as a whole and not fragmentarily, abundantly supports his findings. These findings being supported by the evidence, are, under the facts of this case conclusive upon us."

The Court of Claims in *Anthony Co.* v. *United States,* 56 Fed. (2d) 481, said:

"It is especially urged on behalf of the defendant that the question of whether or not an article is an automobile accessory depends on the relative quantity thereof used in connection with automobiles and used for other purposes, or, as stated in the brief of defendant, the matter of the 'primary adaptability of the air pumps is to be determined with reference to the percentage of the sum total of air pressure made use of for various commercial purposes.' But this is not the rule. Evidence as to the proportionate number used is relevant but not at all controlling—in fact, it is of comparatively little weight. If the rule were otherwise, then the mere fact that somewhere from ten to fifty times as many spark plugs are used in automobiles as for all other purposes combined would be sufficient by itself to show that they were to be regarded as an automobile accessory."

The case of *Perfection Gear Co.* v. *United States,* 41 Fed. (2d) 561, relied upon by the Circuit Court of Appeals, is not in point. In that case the court found that the articles in question (timing gears) were specially designed and primarily adapted for automobiles and trucks, thus giving them a classification as accessories therefor. The court

then held that in such circumstances a taxpayer was liable for the tax on all of the timing gears manufactured and sold, excepting those which the taxpayer could definitely prove were employed in a non-taxable use, in accordance with Regulations 47, Revised, Article 16, which provided that on an article primarily adapted for the taxable types of motor vehicles, the taxpayer could be relieved of the tax to the extent that he could prove sales for non-taxable uses.

II.

Section 424 of the Revenue Act of 1928 does not preclude recoveries in the present actions.

Section 424 of the Revenue Act of 1928 reads as follows:

> (*a*) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924, or subdivision (3) of Section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—
>
> (1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or
>
> (2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or
>
> (3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded

as is not distributed by such manufacturer, producer, or importer within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

(b) The second proviso under the heading "Internal Revenue" in Section 1 of the First Deficiency Act, fiscal year 1928, and the second proviso of the fourth paragraph under the heading "Internal Revenue Service" in Section 1 of the Treasury and Post Office Appropriation Act for the fiscal year 1929, are repealed.

Two motions to dismiss these cases for lack of jurisdiction were made by respondent. The first (R. 5) was denied by District Judge Thomas in an opinion (R. 6). The motion was renewed at the trial (R. 13) and denied by the trial court (R. 31) for reasons given in the opinion.

The respondent contends that the District Court had no jurisdiction to entertain the present actions and render judgment for the petitioner, first, because the actions were not brought prior to April 30, 1928, and, second, because the determination of the questions involved in paragraphs (2) and (3) of Section 424 are exclusively vested in the Commissioner.

The requirement of bringing suit prior to April 30, 1928, if construed as a bar to the present actions, would be unconstitutional.

The date of the passage of the Revenue Act of 1928 was May 29, 1928, and the limitation for the bringing of actions

was April 30, 1928,—anterior in time to the enactment of the Act.

In each of the three present actions, the rejection by the Commissioner of Internal Revenue of the claims for refund which, under Section 3226 of the Revised Statutes, as amended by Section 1113, Revenue Act of 1928, was a prerequisite to the bringing of any action, was made prior to April 30, 1928—the rejection in case No. 3360 being July 5, 1927—the rejection in case No. 3371 being August 23, 1927—and the rejection in case No. 3421 being March 15, 1928 (R. 3, 46, 59).

On the date of the passage of the Act, the petitioner in each of these three cases had a right of action, either against the Collector of Internal Revenue in the District Court, or against the United States in the Court of Claims, with a limitation of time for the bringing of such action of more than one year. Obviously, Congress could shorten this period of limitation, but it could not prescribe a limitation expiring prior to the date of the passage of the Act.

Koshkonong v. *Burton*, 104 U. S. 668;
Federal Grain Co. v. *United States*, 35 Fed. (2d) 260.

The provisions of subdivisions (2) and (3) of Section 424 of the Revenue Act of 1928 did not prevent the maintenance of the present actions or the rendering of judgment therein.

In *Routzahn* v. *Willard Storage Battery Co.*, 65 Fed. (2d) 89, and *Electric Storage Battery Co.* v. *McCaughn*, 52 Fed. (2d) 205, affirmed 63 Fed. (2d) 715, it was held that the provisions of the Act did not prevent the maintenance of an action or the rendition of judgment against the Collector for an illegally assessed tax, but that the administrative decision of the Commissioner on the ques-

tion whether the tax was passed on to the purchaser was in such case deferred until claim is made for the payment of the judgment.

The cases of *Boyle Valve Co.* v. *United States,* 38 Fed. (2d) 135, and *Jefferson Electric Manufacturing Company* v. *United States,* 38 Fed. (2d) 139, held, as does the opinion of the trial court in the present actions, that the question as to whether or not the tax has been passed on to the purchaser is a proper subject for the determination of the court on the trial of the action for the recovery of the tax.

The only judicial decisions in which the respondent's contention that the court was without jurisdiction to entertain actions for recovery of the tax are:

Sterling Spring Co. v. *Routzahn* (N. D. Ohio, not officially reported but found VIII-2 Cumulative Bulletin 358).

Twentieth Century Manufacturing Co. v. *Hopkins* (N. D. Texas, not officially reported but found X-2 Cumulative Bulletin 408).

In *Routzahn* v. *Willard Storage Battery Co.,* above cited, an opinion was rendered on December 16, 1929, denying the motion of the Collector in the District Court to dismiss on the ground of lack of jurisdiction, and in that opinion West, J., states that Jones, J., who wrote the opinion in *Sterling Spring Co.* v. *Routzahn,* cited above, advised him that he did not desire his decision in *Sterling Spring Company* v. *Routzahn* to be regarded as the law of the district. This decision is not officially reported, but may be found in 8 Am. Fed. Tax Reports, 11274.

The doctrine of complete jurisdiction accepted by the court in the present cases is, it is submitted, predicated on far sounder reasoning than the doctrine of partial jurisdiction enunciated in the cases of *Willard Storage Battery*

Co. v. *Routzahn* and *Electric Storage Battery Co.* v. *McCaughn,* cited above.

Until an action is brought, either against the Collector in the District Court of the United States, or against the United States in the Court of Claims, the taxpayer's claim for the recovery of an illegally assessed tax is inchoate. It only becomes a legally enforcible claim when converted into a judgment either against the Collector personally with a right of enforcement against the United States upon the issue of a Certificate of Probable Cause, or upon a judgment against the United States in the Court of Claims.

When the claims for refund in the present actions were passed upon by the Commissioner, Section 424 had not been adopted.

Assuming, therefore, that in any case of a claimed illegal assessment there must be a determination of the illegality of the assessment by a competent court, it cannot be held, in the absence of language permitting no other construction, that Congress could have intended to take away from the taxpayer his right to the determination by a court of the question of the passing-on of a tax which involves no exercise of discretionary powers. If the sole jurisdiction to determine the question of passing-on is vested in the Commissioner, the taxpayer would be in the anomalous position of being required to try out his action in the court of initial jurisdiction with a possibilty of a review by the appellate court, and then his right of ultimate recovery would be dependent upon the decision of an administrative officer of the Government without a prescribed method of review or appeal which is accorded by law with respect to all other similar decisions of the Commissioner.

In the case of *Boyle Valve Co.* v. *United States, supra,* the court, in discussing this question, says:

"The section provides in subdivision (2) that no refund shall be made unless it is established to the satisfaction of the commissioner that such amount was in excess of the amount properly payable upon the sale of an article subject to tax, or, that the amount was not collected directly or indirectly from the purchaser, or that the amount, although collected from the purchaser, was returned to him. This is merely a requirement that the establishment of the fact required by the statute shall be necessary before any refund can be made. There is nothing discretionary in the commissioner about it. The words 'to the satisfaction of the commissioner' used in the act were inserted to make it clear that Congress intended that strict proof should be required. But this does not prevent a taxpayer upon the rejection of his refund claim from bringing suit to recover the tax alleged to have been erroneously or illegally collected, and, if he can do so, to establish to the satisfaction of the court whether he is entitled to a refund under the terms of the act. The case of *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 48 Sup. Ct. 587, 72 L. Ed. 985, does not support the claim that section 424 makes the question whether an article sold is an automobile part or an accessory discretionary with the commissioner. The determination whether the tax was collected by the manufacturer directly or indirectly from the purchaser; that is, whether it was added to the purchase price of the article upon the sale of which the tax was imposed, either as a separate item or as a part of the sales price, is an ordinary question of fact; one with respect of which the courts constantly review the commissioner's determination and one that is involved in almost every suit for refund. It is a question of a type requiring no particular skill or knowledge of accountancy, but merely the ability to weigh evidence and to determine when to believe a witness."

There are in addition certain principles of statutory construction which would prevent the acceptance of the claims made by the respondent.

The present actions when tried by the District Court were actions against the Collector, and the judgments were rendered against him individually. When the judgments were rendered, there was no certainty that a Certificate of Probable Cause would issue. If the Certificate of Probable Cause had not issued, the judgments would have been enforceable only against the Collector, and there would have been no occasion for refunds of the tax to the petitioner under the provisions of Section 424.

When the Certificate of Probable Cause is issued, the United States does not refund the tax as such, but the amount recovered in the judgment is required to be paid from the Treasury of the United States. (Section 989, U. S. R. S.)

Obviously, Section 424 does not in terms apply to the present actions, but the respondent's claim on the trial and in the Circuit Court of Appeals was that Section 424 being special legislation must be treated as a modification of and limitation upon the provisions of the Revised Statutes covering actions of this nature, including Section 989.

The petitioner contends that the rule of construction invoked by the respondent is not the proper one to be applied in the present cases. Giving to Section 424 the full effect which the respondent claims, it takes away in its entirety an existing cause of action. Giving to Section 424 the effect only of vesting in the Commissioner exclusive jurisdiction over the issue of the passing-on of the tax, it withdraws from the jurisdiction of the trial court an issue of the existing cause of action, the determination of which in favor of the petitioner is claimed by respondent to be essential to petitioner's right to final recovery.

There are two well established rules of statutory construction which preclude the adoption of the construction claimed by the respondent: first, that taxing statutes are

not to be extended by implication beyond the clear import of the language used,

United States v. *Merriam,* 263 U. S. 179,
Gould v. *Gould,* 245 U. S. 151,

and, second, that a statute will not be construed as withdrawing by implication the existing jurisdiction of the court in the determination of a taxpayer's rights.

In the case of *Cary* v. *Curtis,* 3 Howard 236, 11 L. Ed. 576, the United States Supreme Court held that a statute requiring a collector to turn over all collections for taxes to the Treasury and directing the Treasurer to refund any money paid as taxes in excess of the amount required by law, eliminated the right to sue the collector at common law, which had been recognized by the court in *Elliott* v. *Swartwout,* 10 Peters 137, 9 L. Ed. 373.

In a dissenting opinion in *Cary* v. *Curtis, supra,* which covered in its discussion the subject matter now under consideration, Justice Story said (page 253):

> "The question, stripped of all formalities, is neither more nor less than this: Whether Congress have a right to take from the citizens all right of action in any court to recover back money claimed illegally, and extorted by compulsion, by its officers under color of law, but without any legal authority, and thus to deny them all remedy for an admitted wrong, and to clothe the Secretary of the Treasury with the sole and exclusive authority to withhold or restore that money according to his own notions of justice or right. If Congress may do so in the present case, in the exercise of its power to levy and collect taxes and duties, and thus take away from all courts, state and national, all right to interpret the laws for levying and collecting taxes and duties, and to confide such interpretation to one of its own executive functionaries, whose judgment is to be at once summary and final, then I must say, that it seems to me to be not what I had hitherto supposed it

to be; a government where the three great departments, legislative, executive, and judicial, had independent duties to perform each in its own sphere; but the judicial power, designed by the Constitution to be the final and appellate jurisdiction to interpret our laws, is superseded in its most vital and important functions. I know of no power, indeed, of which a free people ought to be more jealous, than of that of levying taxes and duties; and yet if it is to rest with a mere executive functionary of the government absolutely and finally to decide what taxes and duties are leviable under a particular act, without any power of appeal to any judicial tribunal, it seems to me that we have no security whatsoever for the rights of the citizens. And if Congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself. Can it be true that the American people ever contemplated such a state of things as justifiable or practicable under our Constitution? I cannot bring my mind to believe it; and, therefore, I repeat it, with the most sincere respect for my brethren, who entertain a different opinion, I deny the constitutional authority of Congress to delegate such functions to any executive officer, or to take away all right of action for an admitted wrong and illegal exercise of power in the levy of money from the injured citizens. I am further of opinion, as I shall endeavor presently to show, that Congress never had contemplated passing any such act, and that the act of the 3d of March, 1839, ch. 82, Sec. 2, neither requires nor in my humble judgment justifies such an interpretation."

Justice McLean also dissenting in the same case (page 263) said:

"But there is another aspect in which this case must be considered. Feeling, as I do, an unfeigned respect

for the opinion of the judges who differ from me, yet I cannot, without concern, look at the consequences of the principle established in this case. The right of a citizen to resort to the judicial tribunals of the country, federal or state, for redress for an injury done by a public officer, is taken away by the construction of an act of Congress, which, in my judgment, bears no such construction. But I will take higher ground, and say that Congress have no constitutional power to pass such an act as the statute of 1839 is construed to be by this decision:

"By the 2d section of the 3d article of the Constitution of the United States, the judicial power extends to all cases in law and equity arising under the Constitution and laws of the union. And by the 7th section of the amendments to the Constitution it is provided that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'

"The act of 1839, in my judgment, does not conflict with either of the above constitutional provisions. But if it take away the right of the citizen to sue in a court of law for the injury complained of, as construed by my brethren, then it is in direct conflict with both of the above provisions.

"In a matter of private right it takes from the judiciary the power of construing the law and vests it in the Secretary of the Treasury, the executive officer under whose sanction or instruction the wrong complained of was done.

"And in the second place it takes from the citizen the right of trial by jury, which is expressly given to him by the Constitution.

"I again repeat that Congress have not done this, nor did they intend to do it by the act of 1839."

The effect of these dissenting opinions is evidenced by the fact that immediately after the rendition of the decision in *Cary* v. *Curtis*, Congress recognized by legislative act a right of action on the part of the taxpayer against a

collector, but this action under the rulings of this Court remained an action at common law.

Sage v. *United States,* 250 U. S. 33, 63 L. Ed. 828.
Smietanka v. *Indiana Steel Co.,* 257 U. S. 1, 66 L. Ed. 99.

In *Graham* v. *Goodcell,* 282 U. S. 409, the Court upheld a provision of the Revenue Act of 1928 which barred the recovery of certain tax over-payments. The decision of the Court was predicated on the right of Congress to deal with a substantive right involved as distinguished from the remedy. Among the claims advanced on behalf of the Government was the claim that the provision of the Act constituted a withdrawal of the right to bring suit as well as withdrawal of the alleged substantive right of the taxpayer. The Court in discussing this claim on page 430 of the opinion said:

> "Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen,* 206 U. S. 391, 51 L. Ed. 1106, 27 S. Ct. 742, 11 Ann. Cas. 688, *supra.* The argument of the government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States. *Sage* v. *United States,* 250 U. S. 33, 37, 63 L. Ed. 828, 830, 39 S. Ct. 415; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1, 4, 5, 66 L. Ed. 99, 100, 101, 42 S. Ct. 1. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong."

Apart from any technical rules of construction, Section 424 is not in its essential characteristics a legislative act entitled to a broad construction. The restrictions which it places upon the right of the taxpayer to recover illegally assessed taxes, outweigh any incidental benefits to subsequent purchasers of the taxable articles.

The Act was enacted subsequent to a series of decisions holding assessments of taxes on alleged accessories by the Commissioner to be illegal. It is limited in its scope to refunds of taxes on parts and accessories, and does not include refunds of taxes on automobiles or trucks where the equities as between the manufacturer and the purchaser are no less entitled to recognition than in the case of parts or accessories.

All taxes paid by a manufacturer, including property taxes, income taxes and excise taxes, are without any essential distinction passed on to the purchaser, but only to the extent that they are absorbed as a cost of production, and can be covered by the sales price.

Costs of all manufactured goods are an aggregate of material costs, labor costs and overhead, including taxes. The selling price of a manufactured article is generally determined by the price which it will bring in a competitive market. Therefore, taxes are passed on to the purchaser to the extent only that the manufacturer receives a price for the article sufficient to absorb in full his costs. A manufacturer first confronted with a new excise tax like the one in question must determine whether the advisable policy will be to attempt to increase the price of the manufactured article by the amount of the tax at the risk of diminishing sales in competition with other manufacturers who may absorb the tax without increase of selling price, or attempt to absorb the tax by maintaining the existing price in anticipation of increased sales resulting from an increase of the sales price by other manufacturers. The

selling price must eventually be determined, however, by the market reaction and not by any arbitrary power of a manufacturer to pass on a tax either directly or indirectly. It follows, therefore, that a manufacturer who increases the price of his goods may, as against a manufacturer who absorbs the tax without increase of price, be the loser on account of diminished sales and the higher production costs resulting therefrom. Such a manufacturer, as against a competitor who did not increase his price, would be penalized by Section 424 through his inability to recover an overpayment in taxes or taxes illegally assessed.

As applied to factual conditions, therefore, Section 424, if construed as preventing or qualifying the enforcement of a common law right of action such as that under consideration, would represent a governmental interference with a taxpayers right to the recovery of an illegally assessed tax, which is not warranted under accepted principles of law, and possibly would go even to the extent of falling within the ruling of *Coolidge* v. *Long*, 282 U. S. 582, that a tax statute may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment to the Constitution.

III.

Findings of Fact and Conclusions of Law of the Circuit Court of Appeals Claimed by the Petitioner to be Erroneous and Without Authority.

The Circuit Court of Appeals overruled certain findings of fact of the district court and conclusions of law thereon, and substituted therefor its own findings of fact and conclusions of law. These facts and conclusions are essential to the determination of the issues before the court, and are covered by petitioner's Assignments of Error in its petition for certiorari. The claim of the petitioner is

that this action of the Circuit Court of Appeals is not justified upon the record and also represents an exercise of judicial authority not vested in the Circuit Court of Appeals.

Discussion of Essential Findings of Fact by the Trial Court Which Were Rejected or Modified by the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion refers to the use of petitioner's chains on non-taxable vehicles as a "diverted use" and one "to which they are not so well adapted" (R. 259, 260).

These rulings were made despite the findings of equal adaptability by the District Court and the evidence of numerous witnesses that identically the same chains were sold and advertised to the trade for use on taxable and non-taxable vehicles, that the chains purchased by owners of non-taxable vehicles were the same chains as those purchased by the owners of taxable vehicles and were purchased by numbers and sizes and without designation of use, that the chains fulfilled the same functions on non-taxable as on taxable vehicles, and that appropriate sizes of chains could be used interchangeably on taxable and non-taxable vehicles, and in their practical use were so interchanged—none of which evidence was controverted by the respondent. (See summary of evidence, Appendix A.)

The Circuit Court of Appeals made three findings which not only disregarded and overruled general findings of fact by the District Court, but incorrectly asserted the absence of evidence in support of the findings of the District Court.

The opinion of the Circuit Court of Appeals stated (R. 259):

"In the absence of evidence showing that such diverted uses required an article of the same design and primary adaptation as is required for the automobile truck and other motor vehicle uses, the appellee could not succeed."

The court further stated (R. 260):

"The appellee admits that the chains involved were chiefly used and adapted for use on the vehicles referred to as taxable in the statute and seeks its refund on the basis that such chains were applicable for performing certain duties such as furnishing traction only with respect to other vehicles. Such assumption does not mean that the chains were not designed nor primarily adapted for use on automobile trucks or other vehicles referred to in the statute as taxable. To succeed, the appellee should have shown by evidence adaptation for other uses. In the absence of evidence of such a showing, it was erroneous to hold that chains equally adapted for a variety of uses for traction purposes only and commonly put to such uses, one of which is on automobiles, cannot be classified as parts or accessories of such vehicles."

The opinion further stated (R. 260):

"Indeed, there is no evidence that the chains referred to by the court below had the same design or primary adaptation for use on tractors."

The incorrectness of these three statements by the court is proved by reference to the testimony of William A. Palmer (R. 101); Walter J. Kretlow (R. 160); George B. Kutz (R. 164); and William E. Wissler (R. 149), excerpts of the testimony of these witnesses being found in Appendix B.

The opinion of the Circuit Court of Appeals stated (R. 260):

> **"It was incumbent upon the appellee to establish that the Weed chains were not designed or primarily adapted to use on automobile trucks, automobile wagons, other automobiles and motorcycles. This burden required a showing that the specific chains sold and for which the tax was imposed were designed and primarily adapted for some other specific use than that of automobiles."**

The Circuit Court of Appeals is correct in its conclusion that the burden rested upon the petitioner to prove that the chains were not primarily adapted for use on the types of motor vehicles enumerated in the Revenue Acts. To meet this burden, however, did not require proof by the petitioner that the chains were primarily adapted for use on non-taxable types of motor vehicles. This Court applied the rule of equal adaptability, which is the antithesis of primary adaptability. There can be no primary adaptability for any one purpose where there is equal adaptability for two or more purposes. Therefore, the petitioner in establishing the fact, as found by the district court, that the chains were as equally adapted for use on non-taxable as on taxable vehicles, met in this respect its full burden of proof.

The Circuit Court of Appeals in its opinion stated (R. 259):

> **"No effort has been made to show that the tensile strength, twisting strains, or weight of the chains was different from those used and usable on automobile trucks or other automobiles."**

This indicated requirement is exactly contrary to the ruling of the Supreme Court in *Universal Battery Company* v. *United States, supra,* that to take a specific article

out of the taxable classification, there must be an equality of adaptation for uses other than in connection with taxable vehicles. If the chains for use on non-taxable vehicles required a different tensile strength or weight than chains for use on taxable vehicles, petitioner would have had no right of recovery, for that fact would have furnished a means for classification of its chains as between chains adapted for the taxable types of motor vehicles and those adapted for the non-taxable types of motor vehicles. In this reference the Circuit Court of Appeals apparently misunderstood a conclusion reached by the District Court.

On the trial of the case in the District Court, the respondent advanced the claim that proof of equal adaptability of chains for non-taxable vehicles could only be established through proof of identical duty requirements, such as tensile strength, twisting strains and weight. This claim on the part of the respondent went, of course, only to the weight and sufficiency of the petitioner's evidence, and that the claim was given full consideration by the court is indicated by its discussion of this claim in its opinion (R. 25):

> "Again, the defendant argues that the question of adaptability is one which can be established only by proof of duty requirements. As to this claim, it need only be said that the Act, the Regulations, and all the reported cases contain no basis for the contention. And it is well established that the question of mechanical adaptability may be shown by pragmatic evidence that the mechanism in question does in fact function. Here, there is an abundance of testimony that the identical chain used on an automobile functions equally well on a non-taxable vehicle. That the testimony is the product of actual experience as distinguished from mathematical computation does not vitiate its admissibility and, if anything, adds to its weight."

The opinion of the Circuit Court of Appeals stated (R. 258):

> **"The patent rights secured from the United States clearly specify that the chains were adaptable for use on automobiles to prevent skidding. They were described as primarily useful for this purpose. If Congress had intended to give exemption to such an accessory to an automobile, it would have so stated as it did in the case of tractors by reference in the statute, or it would have limited the language of the statute so as to afford clearly an exemption therefor, but it used the words 'parts or accessories.' The use of such generic words intended, we think, that they should be given a broad significance to effectuate the purposes of the statute."**

This conclusion is at variance with the ruling of this Court in the case of *Universal Battery Company* v. *United States, supra,* in two respects:

First. The word "primarily" used in conjunction with "adapted" has two distinctive meanings: One—first in order of time; two—first in rank, which would denote a fitness for a specific use superior to that of its fitness for any other use. Obviously the second meaning is the one with which it is employed by this Court and in the Regulations, because the term "primarily adapted" is used as the antithesis of "equally adapted". This is further evidenced by the fact that Regulations 47, Article 16, uses the word "peculiarly" as the equivalent of "primarily" in the definition of articles excluded from classification as accessories.

> "Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles or motorcycles are not subject to tax as 'parts' or 'accessories'."

Also, it is apparent from the standpoint of commercial use that first adaptation in point of time, or even primary adaptation at a time antedating that under consideration, is without relevancy. Electric current was first commercially employed in the telegraph, but today there are hundreds of uses for which it is equally well adapted, although the extent of use differs according to the requirements of each particular use. Pneumatic tires were first employed on horse-drawn vehicles and bicycles, but at the present time they are equally adapted for use in connection with motor driven vehicles. Therefore, the Circuit Court of Appeals in reaching the above stated conclusion has fallen into the error either of according to "primarily" its meaning of first in order of time, or of drawing its conclusion from a commercial status existing at the date of the granting of the patent, entirely different from the commercial status existing during the taxable period.

Second. The conclusion that if Congress had intended to except chains, it would have specified them as it did in the case of tractors, is inconsistent with the ruling of this Court in the case of *Universal Battery Company* v. *United States, supra,* and a number of decisions in the lower courts and departmental rulings, which have held to be non-taxable various articles which in their use have a relationship to the motor vehicles specified in the Revenue Acts similar to chains.

This conclusion of the Circuit Court of Appeals also ignores its own decision in the case of *American La France Fire Engine Company* v. *Riordan,* 6 Fed. (2d) 964, in holding fire engines to be non-taxable, although not specifically exempted in the Act, as were tractors.

The only consistent conclusion from the wording of the Act is that if a legislative intent to tax chains had existed, chains would have been specifically named, as were tires.

The Circuit Court of Appeals Erred and Exceeded Its Authority in Overruling the Findings and Conclusions of the District Court.

There were no special findings of fact and conclusions of law to be reviewed by the Circuit Court of Appeals unless the orders of Judge Hincks (R. 43, 56, 69) make the general findings of fact special findings of fact. If these orders can be given such effect the Circuit Court of Appeals could have reviewed the findings of fact of the District Court only to the extent necessary to determine whether or not they support the judgment of the District Court.

It clearly appears, however, from the opinion of the Circuit Court of Appeals that its conclusions in reversing the District Court were predicated upon a rejection of the findings by the District Court, and the substitution therefor of different findings. This course of procedure deprived the petitioner of its rights to have the determination of the facts made by the trial court which heard the evidence.

The general findings of fact in the opinion of the District Court cannot be construed to be special findings upon the orders entered by Judge Hincks (R. 43, 56, 69), and under Section 700, R. S., in the absence of special findings the general findings of the District Court are conclusive upon all matters of fact and prevent any inquiry into the conclusions of law embodied therein, except the rulings made during the progress of the trial.

Some rulings during the progress of the trial were excepted to and included in the bill of exceptions but were not pressed in the brief or oral argument of the respondent in the Court of Appeals.

The orders made by the District Court on April 29, 1932, were ineffective to create special findings.

In *Fleischmann C. Co.* v. *Forsberg,* 270 U. S. 355, 70 L. Ed. 629, it is said:

> "The opinion of the trial judge, dealing generally with the issues of law and fact and giving his reasons for his conclusions, is not a special finding of facts within the meaning of the statute." (Citing cases.)

In *Java Cocoanut Oil Co.* v. *Pajaro Valley Nat. Bank,* 300 Fed. 305 (9th C. C. A.), the court said:

> "The assumption of the parties that the opinion of the court constitutes a special finding is without foundation, and there is therefore no question before us for review." (Citing cases.) "We have not lost sight of the fact that the opinion is here declared to be the findings of the court, *but such a declaration cannot make of the opinion something which it manifestly is not.*"

One of the leading cases on this point is that of *Rasmusson* v. *Eddy's Steam Bakery, Inc.* (9th C. C. A.), 57 Fed. (2d) 27. After the argument in the Court of Appeals the trial court signed an order *nunc pro tunc* adopting the decision as special findings of fact. The Court of Appeals said:

> "Waiving the jurisdictional question involved, the fact remains that the decision or opinion of the court cannot be treated as special findings in a case at law tried by the court without a jury." (Citing cases.)

Certiorari was denied by this Court on October 10, 1932.

Law v. *United States,* 266 U. S. 494, 69 L. Ed. 401, is authority on the point that the motions for judgment in these cases at the close of the trial did not change the situation and permit the Court of Appeals to review the evidence, as it did, and come to a different conclusion from that of the District Court.

The Findings of Fact.

Petitioner does not concede that the findings of the District Court were special findings, but admitting only for the purposes of argument that they were special findings, the Circuit Court of Appeals was nevertheless limited in reviewing the case "to the determination of the sufficiency of the facts *found* to support the judgment" (Petition 37).

The respondent takes issue with the petitioner on the point as to whether the findings of the District Court were general or special. Petitioner contends that they were general, because they were parts of the opinion, and that the court had no power by its order to make findings that were general into special findings.

Respondent claims that the findings of the District Court were special and for that reason the Court of Appeals had authority to examine the evidence and determine whether that evidence supported the judgment entered by the District Court in favor of the petitioner. Respondent takes this position after the admission found on page 6 of his brief filed in opposition to the petition for certiorari which is as follows:

> "In the instant case the trial judge sitting without a jury in accordance with a written stipulation found all of the facts in respect of the chains involved *necessary to the legal conclusion which he reached.*"

After this admission, respondent, on page 7, says:

> "The findings thus set forth were consequently special findings within the meaning of the statute and the Circuit Court of Appeals under Section 700 *could determine the sufficiency of the evidence to support the judgment.*"

Respondent also states on page 12:

> "There is no substantial doubt that the court had power *to review the evidence.*"

The above quotations (italics ours) show that respondent insists that under Section 700, where the findings are special, the appellate court may consider the evidence introduced on the trial. This is not the import of Section 700 (Petition 37). The part of said section referring to special findings is as follows:

> "And when the finding is special the review may extend to the determination of the sufficiency of the facts *found* to support the judgment."

An appellate court cannot go behind findings of fact of the trial court. There is no authority anywhere, even though the findings are *special,* for an appellate court to consider the sufficiency of the evidence. Its duty is confined to a determination of the sufficiency of the facts *found* to support the judgment. As the respondent has admitted in its brief, as above stated (page 6), that the trial court found "all of the facts in respect of the chains involved necessary to the legal conclusion which he reached," the Court of Appeals had no authority to go behind the findings of the trial court.

In *Mercantile Ins. Co.* v. *Folsom,* 85 U. S. 237, 21 L. Ed. 827, it is said:

> "Propositions of fact found by the court, in a case where the trial by jury is waived, as provided in the act of Congress, are equivalent to a special verdict, and the Supreme Court will not examine the evidence on which the finding is founded, as the act of Congress contemplates that the finding shall be by the circuit court; nor is the circuit court required to make a special finding, as the act provides that the finding of the circuit court may be either general or special, and that it shall have the same effect as the verdict of a jury."
>
> * * * * * * *
>
> "Issues of fact, however, under such a submission, are to be tried and determined by the circuit court, and

it is equally clear that the findings of the circuit court, even when special, cannot be reviewed by the Supreme Court, except for the purpose of determining whether the facts found are sufficient to support the judgment, as the express provision is that the finding of the circuit court in such a case shall have the same effect as the verdict of a jury."

In *Anglo-American, etc., Co.* v. *Lombard* (132 F. 721, 733), Justice Van Devanter, then Circuit Judge, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "In actions at law, where a trial by jury is waived, the duty of finding the facts is placed upon the trial court. We have no authority to examine the evidence for the purpose of finding the ultimate facts, or of correcting or completing a special finding which is imperfect or incomplete." (Citing cases.)
>
> (Certiorari denied, 196 U. S. 638, 49 L. Ed. 630.)

In *Electric Reduction Co.* v. *Lewellyn,* Collector of Internal Revenue (8 Fed. (2d) 91), the District Court for the Western District of Pennsylvania made special findings of fact and gave judgment for the defendant. The Circuit Court of Appeals (11 Fed. (2d) 493) reversed the District Court, but this Court in 275 U. S. 243, 72 L. Ed. 262, sustained the District Court and reversed the Court of Appeals, using the following language:

> "A trial by jury having been waived in writing, our review in this case is limited to the sufficiency of the *facts specially found* to support the judgment, and to the rulings excepted to and presented by the bill of exceptions." (Italics ours.)

In *Ingram-Day Lbr. Co.* v. *McLouth,* 275 U. S. 471, 72 L. Ed. 378, this Court said:

> "Since a jury was waived in writing, appellate review is limited to the sufficiency of the *facts specially*

found to support the judgment and to rulings excepted to and presented by a bill of exceptions." (Italics ours.)

In *U. S.* v. *U. S. F. & G. Co.*, 236 U. S. 527, 59 L. Ed. 703, this Court said:

> "Assuming these defenses were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court. The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment."

Considering the state of the Record, it makes no difference whether the findings of fact are general or special. If general, there was nothing for the Court of Appeals to consider for there were "no rulings during the progress of the trial" that respondent demanded that the Court of Appeals should reverse, except the ruling on Sec. 424 of the Act of 1928, which the Court of Appeals ignored. If the findings were special, then the sole question was: Are the special findings found sufficient to support the judgment? This they do as is shown by the opinion of the District Court.

Conclusion.

The phraseology of the provisions of the 1921 and 1924 Revenue Acts under consideration, and the necessity for making a determination of the taxability of manufactured articles at the instant of sale by the manufacturer, make impossible any interpretation of those provisions which would permit each individual article of manufacture to be classified according to its ultimate use.

Judged by the standard of ultimate use any devisable general method of classification necessitates subjecting to

taxation individual articles which would otherwise be free from the tax, and the release from taxation of certain individual articles otherwise subject to the tax. The rule of classification approved by this Court in the case of *Universal Battery Company* v. *United States* is a rule which can be applied with accuracy, and is essentially fair to the Government and to the taxpayer.

For the reasons stated in this brief, it is submitted that the decision of the District Court of Connecticut is a fair and logical application of this rule to facts properly found on adequate evidence.

Respectfully submitted,

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APPENDIX "A."

Statement of Evidence Relating to Use of Tire Chains.

(a) *Evidence proving that Weed chains were not especially designed for use on automobiles and trucks.*

Weed Tire Chains were not made especially for tractors, automobiles or trucks (R. 114, 146, 147); that during the taxable period chains were not purchased as designated for tires of tractors or automobiles, but were bought by sizes (R. 121); that Weed Tire Chains used on automobiles and trucks had no peculiar characteristics or design which were not identical to Weed Chains for use on tractors, fire apparatus and road machines, the general design being the same and differing only in weight as the size of the chain increases (R. 130, 137, 156, 76, 142); that there was no tire chain specially made for a tractor, but the chain in existence

at the time of the advent of the tractor was applied to the tractor (R. 134, 153, 167); that there was nothing to prevent the use of the usual car tire chain on a truck or a pneumatic truck tire chain, on a solid tire, or a single or dual, other than the weight of the material used in construction of the chain (R. 137); that Weed Tire Chains made during the taxable period were similar in design and make to those that are manufactured by the company at the present time and would fit the standard make of tires of all automobiles, trucks, and road machines, regardless of their use (R. 74); that they could be detached from automobile and truck tires and used on the same size tires of tractors, fire apparatus or road machines without any change in the chains (R. 77, 142); that there was no difference in the kind of Weed Chains sold in one part of the United States and Canada from what was sold in any other part (R. 78); that Weed Chains were generally used on Walter snow fighters without inquiry being made as to whether they were especially designed for snow fighters and they preformed the identical function as chains on an automobile, when the sizes that would fit the tire of the machines were used (R. 99, 100); that the company did not manufacture a chain especially designed and sold for trucks (R. 146, 147), or for use on fire equipment, or for use on self-propelling motor-driven machines (R. 121, 127, 147); that the chains which the company manufactured and sold for automobiles and trucks were of the same design generally as those which they manufactured and sold for tractors, road maintenance machines, and fire apparatus (R. 125). (The witnesses who testified to the above were residents of Minneapolis, Minnesota; Omaha, Nebraska; Kansas City, Missouri; Des Moines, Iowa; Chicago, Illinois; Atlantic Beach, Long Island; and Evanston, Illinois.)

(*b*) *Weed chains were equally adapted for and during the taxable period were commonly used on tractors, fire appartus, and road machines as well as on automobiles and trucks.*

Weed Tire Chains were used on tractors and trucks; in ordering chains no distinction was made as to whether

they were to be used on trucks or tractors (R. 102, 164); that in storing the chains, they did not keep those for trucks separate from those for tractors (R. 113) and no special barrels or bins were kept for storing chains to fill orders of State highway commissions for fire apparatus or police equipment (R. 161) and orders from State highway commissions for chains were filled out of regular stock as they were if they were orders for private automobiles or trucks (R. 161); that if an order came for a set of dual chains for tractors they would be taken off the same pile as if ordered for the same size truck (R. 114) there being no markings showing which were truck chains and which were tractor chains (R. 114); that Weed tire chains could be used on tractors and road equipment as well as on trucks and automobiles (R. 118); that they were used on Fordson tractors and International and Liberty trucks (R. 132); that they could be used as well on tractors as on automobiles (R. 135); that particular sizes of chains may be used on any type of vehicle having rubber tires, either solid or pneumatic, if the sizes were comparable (R. 140); that a Weed chain of a suitable size could be used just as well on a tractor as on a truck (R. 148, 164, 197, 76, 141); that Weed chains sold for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks; that there were no peculiar characteristics about a Weed chain that prevented it from being sold for general use as a commercial commodity and which made it primarily adapted only for use as a component part of a privately owned automobile or truck (R. 149, 150); that Weed chains were used for road maintenance and road equipment and for the fire department of Chicago and other municipalities and for tractors (R. 156); that the difference in Weed chains used on automobiles and those used on fire apparatus was primarily a difference of size (R. 90, 91); that Weed chains were used on Fox rotary snow brooms (R. 95) and Walter snow fighters (R. 98) and a chain of appropriate size that will fit on an automobile or a truck could be used on a fire apparatus or road equipment equally as well (R. 142).

(c) Weed chains were interchangeable and could be used equally as well on tires of automobiles, trucks, tractors, fire apparatus and road machines.

Weed tire chains were interchangeable for use on automobiles and trucks or tractors, if the proper sizes were used, without any change in the chains (R. 102); that chains commonly used on trucks could be used on tractors without any substantial change (R. 105, 127); that in buying chains it was not specified that they were for use on tractors or trucks but they were used interchangeably (R. 113); that a Weed tire chain could be taken off a Pierce Arrow or the Liberty trucks and used on a Fordson tractor (R. 116); that a pair of Weed chains meant for a tractor could be used on a Packard car (R. 123); that a pair of chains used on a fire engine were used on a Ford (R. 104); that chains used on fire apparatus worked just as well on a Locomobile (R. 106, 107), that tire chains may be detached from automobile or truck tires and attached to tires of the same size on tractors, fire apparatus, road equipment vehicles, without any change or adaptation (R. 77, 123, 130, 137, 149, 165, 179, 142); that specific sizes of Weed chains could be placed on tires requiring those sizes and that a 40 x 5 chain could be put on a 38 x 6 tire (R. 132); that the size on a truck and a tractor being the same, the truck chain would come right off the truck onto the tractor (R. 138) and you could interchange them providing the tire sizes are the same; that Weed tire chains were used on fire apparatus, tractors, road maintenance machines such as graders, snow plows, and similar vehicles including road sprinklers (R. 125); that Weed chains used on fire apparatus and road equipment did not differ in any way from Weed chains sold and used on private automobiles and trucks; they were interchangeable (R. 142).

APPENDIX "B."

Excerpts of Evidence of Witnesses Referred to on Page 24 of this Brief.

William A. Palmer, General Foreman of Maintenance, District 9, of the State of Minnesota, testified (R. 101, 102)

that the regular stock Weed chains were used on tractors, and were ordered by sizes. He stated as follows:

> "We made no distinction as to whether they were to be used on trucks or tractors, just used them as we saw fit."

Walter J. Kretlow, a warehouse manager for the appellee, testified (R. 160):

> "I filled orders for the City of Chicago designating delivery at 35th Street, and also on, I think, Loomis Street, out of our regular stock that we sold for automobiles, tractors and trucks, indiscriminately according to size."

George B. Kutz, salesman for the American Chain Company, testified (R. 164):

> "A Weed chain of suitable size can be used as well on a tractor as on a truck. I sold chains that were put to use on tractors. I took orders for chains for the jobbers. I have sold chains for use on tractors, fire apparatus and road equipment used in the construction and maintenance of roads."

and, on page 165, he testified,

> "Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobile and truck tires and used on tires of the same size on tractors, fire apparatus or road equipment without any change in the chains. The Weed chains sold by me during the taxable period in my territory for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks."

William E. Wissler, engaged in the wholesale automotive business at Des Moines, testified (R. 149):

> "Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus, or road equipment. Weed chains may be detached from automobiles or truck tires and used on tires of the same size on tractors, fire apparatus or road equipment without any change in the chains."